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CRITICAL NOTE.

RAMGOPAL *v.* DHANJI JADHAVJI BHATIA, (1928) L.R. 55 I.A. 299: I.L.R. 55 C. 1048: 55 M.L.J. 248 (P.C.).

The decision of the Privy Council in this case deals with an important point in the law of damages arising out of an *anticipatory* breach of contract, namely, how and in what manner the plaintiff ought to have mitigated the damages. The position is summarised in the concluding passage thus: "The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages as they then stood and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him." It is difficult to understand what was meant by the words "as they then stood". Could it have been intended thereby to depart from the well-established rule that even in cases of anticipatory breach the damages ought to be assessed with reference to the date of performance though the plaintiff might bring his suit immediately after the breach? The position that the plaintiff need not have purchased cotton will be perfectly intelligible if other means of having the cotton ginned were unavailable. But it appears from the judgment that there were other mills in which the cotton could have been ginned on payment of an extra cost. Under those circumstances the question reduces itself to whether the plaintiff was bound to enter into a fresh contract with some other ginning mill after the breach and before the date of performance. If he must, then it follows that he should have had the cotton ready. Supposing in the case under discussion instead of the defendant having been in breach the plaintiff was, can the mill-owner recover the entire ginning

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charges by way of damages without attempting to get other cotton for being ginned?

In England the preponderance of authority seems to be in favour of the view that "if the plaintiff acts unreasonably in not making a new contract before the time of performance, which will secure substituted performance at lower cost than would be required when performance is due, his damages will be based on such lower cost.*" This rule which seems to have had its origin in an observation of Cockburn, C. J., in *Frost* v. *Knight*[1] has been largely invoked in cases of contracts for the sale of goods. No doubt Kelly, C.B., took the view in *Brown* v. *Muller*[2] that the plaintiff could not be called upon to enter into a fresh contract, but Bramwell, B., who had left the Court before judgment was pronounced seems to have thought otherwise and in *Roper* v. *Johnson*[3] the latter view found favour. It may be mentioned incidentally that Mr. Mayne's view as to the effect of *Roper* v. *Johnson*† is open to question. Far from following *Brown* v. *Muller* the learned Judges sought to explain it away on the ground that it simply negatived the plea that the *onus* rested on the plaintiff in such cases to prove his inability to enter into a fresh contract. It was clearly indicated that the result would have been different in the case before them if the defendants had adduced evidence to the effect that "the plaintiffs could without extraordinary trouble have entered into another contract".

In *Roth & Co., Ltd.* v. *Taysen, Townsend & Co.,*[4] a seller's action to recover damages, the Court of Appeal held affirming a judgment of Mathew, J., that the plaintiff's failure to sell the cargo at a favourable time was unbusinesslike conduct and the same was made the ground of estimating the damages on a diminished scale. It cannot seriously be contended that it makes any difference in principle whether the action is at the instance of the seller or the buyer *Paysu Ltd.* v. *Saunders*[5] was a buyer's action and it was held that the plaintiff was bound to accept a substituted contract on modified terms offered by the seller in default. It may per-

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*Mayne on Damages, 10th Ed., p 123

1 (1872) L.R. 7 Ex. 111 at 113. 2. (1872) L.R. 7 Ex. 319 at 322.

3. (1873) L.R 8 C P 167.

†*See* Mayne on Damages, 10th Ed., p 164.

4. (1896) 12 T L R 211: 1 Com Cas. 206 *See also* Judgment of Mathew, J., in 12 T.L.R. 100

5 (1919) 2 K.B. 581 (C.A.).

haps be said that it is one thing to hold that the plaintiff ought to accept an available contract, another thing altogether to claim that he should *endeavour* to obtain a new one. But two subsequent decisions seem to have gone the length of saying that the latter course must be pursued if circumstances permit. In *Melachrino* v. *Nickoll*[6] the decision turned on the question whether the time for the performance of the contract was 'fixed' within the meaning of the Sale of Goods Act. But the judgment of Bailhache, J., contains a lucid exposition of the rule as to mitigation of damages in cases of anticipatory breach. He says: "It is the duty of the buyer to go into the market and buy against the defaulting seller if a reasonable opportunity offers. This is expressed by the phrase 'it is the buyer's duty to mitigate the damages'. In that event the damages are assessed with reference to the market price on the date of the re-purchase. If the buyer does not perform his duty in this respect the seller is none the less entitled to have the damages assessed as at the date when a fresh contract might and ought to have been made." The later case of *Millet* v. *Van Heek & Co.*[7] is perhaps more authoritative not only because it was a pronouncement of the Court of Appeal but also because the question there arose directly. It was held that the difference between the contract price and the market price was only a *prima facie* rule. Where the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date of the breach or at some later date the damages should be assessed according to the difference between the price in that forward delivery and the contract price. The test seems to be whether the plaintiff acted as a prudent man of business. It will of course be a question of fact in each case whether he acted unreasonably in not entering into a forward contract. (*Payzu, Ltd.* v. *Saunders*[5].) It is also fairly clear that in such cases the *onus* rests on the defendant to prove that the plaintiff could reasonably have mitigated the damages in that manner.

The cases referred to above are no doubt cases under the Sale of Goods Act but the principle underlying them would seem to be one of wider application in the law of contracts. Thus it is said that "if a charterer refuses to load the agreed cargo, the master should do what he prudently can to get another

5. (1919) 2 K B 581 (C.A.) 6. (1920) 1 K B 693 at 697.
7. (1921) 2 K.B. 369 (C.A.).

cargo, at as good a freight as may be had, and so avoid sailing empty". (Carver's *Carriage by Sea,* 7th Ed., p. 991.) In *Harries* v. *Edmonds*[8] Baron Parke took the view that if the contract had been broken by the freighter not putting any cargo on board within the stipulated time, it was the captain's duty to take a cargo at the most he could get so that the damages to be paid by the freighter should be reduced as much as possible. In that case, however, it appears that the freighter's agent did in fact offer a substituted cargo. Whether it is the shipowner's duty to endeavour to obtain a fresh cargo is answered by the later case of *Wilson* v. *Hicks*[9] It was held that the conduct of the captain in remaining inactive at the port of loading and declining to go to some other port in the hope of obtaining a cargo was unreasonable and that he could not recover full freight. In *Smith* v. *M'Guire*[10] Martin, B., threw out an observation that the shipowner was not bound to go and look for employment for his ship in order to relieve the charterer from the consequences of the breach. This was, however, by way of *obiter* and has not been followed in later decisions. In *Aitken Lilburn & Co.* v. *Ernsthausen & Co.*[11] the above case was cited but no reliance was placed on the observation of Martin, B. In fact the counsel who appeared for the plaintiffs seems to have thought it unarguable and A. L. Smith, L.J., says: "It is not disputed that when the defendant refused to perform his obligation (to load cargo) it was incumbent upon the plaintiffs to do what was reasonable to mitigate the damages......and that, if the plaintiffs could reasonably obtain other cargo to fill up the space which the defendant had wrongfully refused to fill up, they were bound to do so." A similar view was expressed by Mathew, J., in *Nickoll & Knight* v. *Ashton, Edridge & Co.*[12] and the same was approved by Vaughan Williams, L.J., on appeal.

In the converse case, if there is default on the part of the carrier to provide the means of conveyance, it has been held that the freighter must reasonably utilise such other means of conveyance as may be available. *Irvine* v. *The Midland Great Western Railway (Ireland) Company*[13] is illustrative.

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8. (1845) 1 C. & K 686 9. (1857) 26 L. J Ex 242.
10 (1858) 3 H & N 55[illegible] 157 E R 589.
11. (1894) 1 Q.B. 773 (C A.) at 781 per A L Smith, L J.
12. (1900) 2 Q B. 298 at 305, on appeal (1901) 2 K B. 126 (C A.) at 138 *per* Vaughan Williams, L J
13 (1880) 6 L. R. Ir. 55

The railway company committed a breach of contract in refusing to provide the agreed type of wagons for loading hay. The plaintiff kept the hay for some time and sold it for a much smaller price than what it would have fetched if it had been sold at the place of destination. It appeared, however, that the plaintiff could have got some other type of wagons or at any rate that he could have sent them to the place of destination by cart track. It was held that the plaintiff could recover by way of damages only the extra charge of conveyance that might have been incurred if those other means of conveyance had been availed of by him.

Take again an ordinary contract of letting or hiring. *A* agrees to let his house to *B* at a certain rent. *B* refuses to take the house and is sued for damages. It is submitted that the proper measure of damages in such a case is the loss of rent suffered by *A* after deducting such sums as he might and ought to have recovered as rent from another person if he had taken reasonable steps to secure another tenant. *British Steamship Automatic Delivery Co., Ltd.* v. *Haynes*[14] was a case of contract of hiring. The defendant wrongfully refused to accept the machines which he had hired for a period and the plaintiffs made no attempt to re-let the same. It was held that the measure of damages was the amount of the rent from the time the machines were tendered until the expiration of such a period as the plaintiffs would require in order to re-let the same to somebody else. This ruling will be directly applicable to the converse of the Privy Council case which has been indicated above.

The rule as to the plaintiff's duty to minimise damages has also been applied in cases of breach of contract of service. Both in *Smith's Law of Master and Servant* (7th Ed., p. 114) and in the notes to *Cutter* v. *Powell*[15] (*Smith's Leading Cases,* 12th Ed, p. 57), the rule is stated somewhat cautiously. It is said that "if the servant could have obtained other employment of a precisely similar kind which a reasonable man would have accepted he can only recover nominal damages." It is not quite clear whether they intended to approve of the rule that the employee is under an obligation to *look for* other employment after the date of his wrongful dismissal. It may be said that in *Macdonnel* v. *Marsden*[16]

14. (1921) 1 K B 377

15. (1795) 6 Term Rep. 320

16. (1884) Cab. & E 281.

and *Brace* v. *Calder*[17] which are the cases relied on, substituted employment had been *offered* to the employee. But the rule in its extended form had been laid down by Erle, C.J., in the earlier case of *Beckham* v. *Drake*[18] where he says: "The measure of damages for the breach of promise of service is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained...... and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use reasonable diligence to find another employment". It cannot therefore be said that the plaintiff's duty ends with accepting the offer of an alternative employment. In many cases such employment may not be procured without his taking certain steps. It will, of course, be a question of fact what steps he should take and what kind of employment he should accept.

What is the application of the rule to the case of a breach of contract of marriage? If *A* promises to marry *B* after ten years and breaks it the next day, should *B* go about and see if some other suitable alliance can be obtained. The injured party might feel so disappointed that she might choose to remain a spinster for the rest of her life. In such a case can her conduct be styled unreasonable? While it would be ludicrous to hold that any such duty is cast upon the injured person it cannot be ignored that if as a matter of fact some other suitable marriage is arranged the party in default can plead the same in mitigation of damages. The difficulty in applying the rule as to mitigation in its extended form arises in such a case because of the peculiar nature of a marriage contract. In such a case the damages are for the bodily or mental pain of the injured party and the action is more *ex delicto* than *ex contractu*.

Thus it will appear fairly well settled that in a case of anticipatory breach the plaintiff is under a duty after accepting the repudiation to endeavour to obtain substituted performance if such a course appears reasonable. This is merely an application of the broader principle enunciated by Loreburn, L.C., in *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corpora-*

17. (1895) 2 Q.B. 253 (C.A.).
18 (1849) 2 H.L.C 579 9 E.R 1213 at 1223.

tion[19] that "even those who have been wronged must act reasonably." The substance of the rule was also laid down by Haldane, L.C., in *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Railways Co. of London*[20] in the following words: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second which imposes on a plaintiff the *duty* of taking all reasonable steps to mitigate the loss consequent on the breach and *debars* him from claiming any part of the damage which is due to his neglect to take such steps".

Under the Indian Law the rule as to mitigation is stated quite broadly in the explanation to section 73 of the Contract Act as one applicable to all kinds of contracts. It says that "the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account." Both in *Jamal* v. *Moolla Dawood Sons & Co.*[21] and in the case under discussion the Privy Council has recognised the general principle that the plaintiff should mitigate the damage. Whether it is his duty to enter into a forward contract in order to get substituted performance has not however been so frequently raised. The point was discussed in an early case which came up before the Sindh Judicial Commissioner's Court and one of the Judges was inclined to follow *Roper* v. *Johnson*[3] (See *James Finlay & Co., Ltd.* v. *David Sassoon & Co.*[22]) In another case which came up before the Rangoon High Court the question seems to have been answered though without reference to authorities. In *Ma Hnin Yi* v. *Chew Whee Sheih*[23] the defendant failed to place a rice-mill at the disposal of the plaintiff during the paddy season. In an action to recover damages their Lordships Heald and Chari, JJ., held that "if it had been proved that the plaintiff could have obtained some other mill then he was only entitled to the difference between the rent reserved under the lease and the rent he would have to pay for the other mill". As it was, the learned Judges had to decide the case in the absence of any evidence, but the position seems to have been recognised that the plaintiff was under a duty to endeavour to get

3. (1873) L.R. 8 C.P. 167.

19 (1908) A.C 323 at 326

20. (1912) A C. 672 at 689.

21. (1915) L.R. 43 I.A 6: I.L.R 43 C. 493: 30 M.L.J. 73 (P C.).

22. (1912) 27 I.C. 102

23. (1925) 90 I.C. 635: A.I.R 1925 R. 261.

substituted performance and that the defendant should prove that he could do so. The principle was also applied by the Madras High Court in a case of improper termination of a lease by the lessee. (*Govindasami Chettiar* v. *Palaniappa Chettiar*.[24]) It was held by Ramesam, J., that the lessor was under a duty to mitigate the damages by taking new tenants for the unexpired period of the lease for a smaller rent.

It would thus seem that in the case under discussion the Privy Council proceeded on too narrow a view of the rule as to mitigation of damages. If their Lordships had decided the case on the ground that it was a mixed question of law and fact and that the defendant should have proved not merely that there were other mills at which the cotton could have been ginned, but also that they would have been available if necessary steps had been taken, there may be nothing to say against it. As it is, the statement of law extracted in the headnote that "the plaintiff was not bound to buy cotton and have it ginned at other mills under his obligation to mitigate the damages" seems to be too broadly worded. The question being one of some nicety and of great importance to the commercial world it is hoped that when the matter arises again there will be a fuller and more authoritative pronouncement on the point.

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SUMMARY OF ENGLISH CASES.

GRAY AND OTHERS *v.* PERPETUAL TRUSTEE COMPANY, LTD. AND ANOTHER, (1928) A.C. 391.

Mutual Wills of husband and wife—If can be revoked by the wife—Effect of wife taking benefits under the husband's Will—Terms of husband's Will not putting her to election—No approbation and reprobation.

Mr. and Mrs. Hargrave made Wills simultaneously in each other's favour. The husband died first and the wife took the benefits conferred upon her by the husband's Will. Subsequent to his death, she executed another Will which interfered with the provisions of her prior Will. Their Lordships held that the evidence did not establish any binding contract between the husband and the wife not to revoke the Wills and that the mere fact of making Wills mutually is not by itself evidence of an

24. (1925) 48 M.L.J. 397.

agreement between the husband and the wife and that 'without such a definite agreement there can no more be a trust in equity than a right to damages at law'. *In re Oldham* [(1925) Ch. 75] approved.

On the further question of election, *held* that there was nothing in the language of the husband's Will which either put the wife to her election, or put her in the position of seeking at the same time to approbate and reprobate its provisions.

In re STOKES. BOWEN *v.* DAVIDSON, (1928) Ch. 716.

Will—Bequest of legacies—Time for commencement of interest on the legacies—Death of the testatrix or a year after death—S. 43, *Conveyancing Act,* 1884.

By a Will and codicil, a testatrix bequeathed three sums of money (referred to as funds *A, B* and *C*) to trustees of the Will upon different trusts. The question was as to the time from which interest was payable on the three funds. *Held* "that the ordinary rule is that a legacy carries interest only from a year after death, save in certain circumstances, as, for instance, where a testator gives a legacy to his infant child or to a person to whom he stands in *loco parentis;* but it may however be inferred from the context of the Will that a legacy not *prima facie* carrying interest is intended to carry interest from the date of the death;" the bequest of a sum with power to maintain out of income is an indication that interest must run from death and it is not necessary that there must be in the Will an imperative trust to maintain out of income. As regards the two sums *A* and *C, held,* there was a clear intention appearing in the Will that the sums should carry interest from death; with regard to the sum *B,* there was nothing special from which, if the fund stood alone, it could be so inferred, but from its being one of a group of three legacies, two of which clearly carried interest from death, *held B* also carried interest from death.

ROBINS, *In re.* HOLLAND *v.* GILLAM, (1928) Ch. 721.

Trusts—Costs of necessary repairs to trust premises—Whether to be borne by capital or income—Trustee's discretion—Not interfered with if bona fide*—Court's powers to decide.*

A testator devised in favour of certain trustees appointed by his Will his real estate and directed them to pay the income arising from them to a class of persons during their lives and

on the death of the last survivor of that class, the estate to be sold and the proceeds thereof divided amongst another class of persons then ascertainable. The trustees in the course of due management of the estate effected certain necessary repairs to the trust premises and applied to the Court for directions as to how the expenses of repairing should be borne as between capital and income.

Held, that both under section 102 of the Settled Land Act, 1925 and section 28, clause (2) of the Law of Property Act, 1925, the trustees have a discretion to allot the expenses either to capital or income and if the trustees should exercise it *bona fide,* the Court will not interfere with it. But if the trustees without exercising it themselves apply to the Court for directions, the Court is free to determine the question with due regard to the principle laid down in such cases as *In re Hotchkys* (32 Ch. D. 408).

SPENCER AND HAUSER'S CONTRACT, *In re,* 97 L.J.Ch. 335.

Immoveable property—Vendor and purchaser—Contract to make title in a particular capacity—If amounts to a warranty to make title in that capacity—Purchaser if can repudiate.

In a contract to sell real estate, the vendors were stated to be selling as trustees for sale under a Will; they were in fact legal personal representatives of the testator. The question raised was whether the purchaser can be compelled to accept the title which they could give as such legal personal representatives when they could not make title in the capacity in which they stated they would make it. *Held,* that as a man who enters into a contract to sell land, stating that the title begins with a certain document, may make title in any way he can, so too if a man contracts to make title in some particular capacity, that is only a warranty that he will make a good title and not that he will make it in the particular form. The contract does no more than indicate the way in which the vendor is contemplating to make a title.

JOHNSON *v.* CLARKE, (1928) Ch. 847: 97 L. J. Ch. 337.

Specific performance—Contract for sale of real estate—Described as subject to a tenancy from year to year—Tenant setting up an option to purchase and option for a lease—If purchaser can repudiate on that ground—Court's duty to de-

cide validity of tenant's title—Agreement to tenant signed by one executor only—If sufficient.

The defendant in the action had agreed to purchase certain freehold property consisting of cottages and a dwelling-house (Sandwell Grange) with lands adjoining, but he refused to complete the purchase on the ground that, a third party Richards set up an agreement with the plaintiffs (executors) giving him an option of purchase and an option for a lease for his life at the same rent. The agreement was contained in a letter signed by one of the three plaintiffs alone as for himself and his co-executors but it was found that this had not been communicated to the co-executors. In the contract for sale the tenant was described as a tenant from year to year and the purchaser had notice only of that.

Held, that Richards was only a tenant from year to year and it was beyond the powers of the vendors as personal representatives to grant an option to take a lease for an indefinite period at the same rent.

The Court in an action for specific performance has, according to the modern practice, to decide on the facts proved in the case, if the third party claimant has a reasonable chance of success in an action against the purchaser, even though the decision may not bind the third party interested. But if there is any mode by which the question can be effectively determined in such a manner as will bind all the persons interested in the estate—by originating summons or something of that sort—the Court will not then force a title upon the purchaser.

In re MASON, (1929) 1 Ch. 1.

Limitation—Ex gratia *grants by Crown of lunatic's funds—Claim long after, by alleged next-of-kin's representatives—Mistake of fact—Starting point of limitation—Intestates Estates Act,* 1884, *Section* 3.

In 1926 certain persons claiming to be the representatives of the next-of-kin of a lunatic who died in 1798 presented a petition of right asking for payment to them of the lunatic's personal estate which was then with third persons under an *ex gratia* grant from the Crown. In the course of administration proceedings relating to the estate of the lunatic's father the Master had reported that she had no heir-at-law or next-of-kin and that had been confirmed by the Court. Relying on

this, the Crown had made the grants in question subject to any claim or right of any person who should thereafter by due course of law prove himself to be her next-of-kin. It being contended that the petition of right was barred by limitation,

Held, that it was barred by section 3 of the Intestates Estates Act of 1884. On the finding of the Master, which was confirmed by the Court, the title of the Crown to the estate was immediate and effective (the estate being *bona vacantia*) and Crown took and held it as of right and not in trust for any person.

Even as an action to recover money paid under a mistake of fact, the statute must be taken to have run from the date of payment and not from the date of discovery of the mistake nor from the date when the plaintiff might have discovered it by the exercise of reasonable diligence.

Quaere.—If *Rustomji* v. *Queen*, 1 Q.B.D. 487, is good law.

SMITH *v.* WOOD, (1929) 1 Ch. 14.

Principal and surety—Charge by several persons of their respective properties for the whole debt—Release of one property from security without the consent of the other parties—Effect of—Quantum of prejudice if material.

A number of persons deposited their respective properties with the defendants and charged them with the repayment of a debt due to the defendant. They did not undertake any personal liability but each of the properties was charged with the whole debt. One of the properties was withdrawn from the charge. *Held*, that the principles of law applicable to sureties apply to all cases where adjustment of rights *inter se* by contribution or marshalling arises. The creditor cannot make a particular and separate bargain with one of the depositors releasing the security put up by him from liability without the consent of the other parties to the deed, the extent of the alteration or prejudice thereby being immaterial.

WELD *v.* PETRE, (1929) 1 Ch. 33.

Mortgage of shares—Loan not repaid—Shraes transferred to mortgagee's name—Dividends, etc., received from the company by mortgagee—More than enough to pay off the mortgage money with interest—Redemption action on originating summons—Time limit for redemption of mortgage of personalty

—Delay more than 12 years—Claim for accounts of dividends received.

The action was brought to redeem a mortgage of shares in a limited company. The mortgage was effected 26 years before to secure a loan of £1,000 repayable in three months with interest. The loan was not repaid but the mortgagee to whom the shares had been transferred had received from the company direct by way of bonus, dividends, etc., more than enough to cover the mortgage amount with the stipulated interest. The defence was that the claim was stale and barred by limitation, laches and acquiescence.

Russell, J., and on appeal, the Court of Appeal negatived the proposition that in the absence of a statutory bar for redemption of mortgages of personalty, the Court ought to apply the 12 years rule of limitation on the analogy of the Statute of Limitations relating to land, and further *held* that unless the right to redeem has been destroyed by statute, foreclosure, sale or release, equity should not deprive mortgagors of their right to redeem, if when they assert it, the debt has been or can be repaid, the security is available, and there has been no change in the position of the mortgagee or any one claiming under him which would make it unjust, or inconvenient, or impossible to restore the parties to their original position. But if the mortgagor who could object, lies by and knowingly permits another to alter his position, it will amount to acquiescence and in that case, even a shorter period of delay would constitute a sufficient ground for refusing relief.

Per *Lawrence, L.J.*—There is no rigid rule that every equity must be acted upon at the utmost within 20 years and if not so acted upon will be barred. The only question is if "it would render it practically unjust to give the plaintiffs their remedy."

The Court of Appeal (differing from Russell, J.), *held* that in a redemption action, an order for payment by the mortgagee of the amount which his estate has been overpaid may be made on an originating summons.

Distinction between bar by limitation, laches and acquiescence pointed out.

TILLING-STEVENS MOTORS, LTD. *v.* KENT COUNTY COUNCIL, (1929) 1 Ch. 66.

Revenue—Petrol-electric motor—If 'electrically propelled' —Finance Act, 1926, *Section* 13, *Sch. I, para.* 5.

Is a vehicle called the petrol-electric motor an "electrically propelled" vehicle within the meaning of para. 5, Sch. I of the Finance Act, 1926? The primary motive power of the motor is the usual four cylinder internal combustion engine operating by the combustion of petrol coupled through a spring drive to an electric generator which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear.

Held, by the Court of Appeal (Russell, L.J. dissenting) reversing the decision of Clauson, J. that it is not an electrically propelled vehicle. The vehicle only provides a simpler method of running in what is a petrol-driven vehicle. Petrol is the essential for the car as without it the electricity cannot be generated to drive the rear wheel.

Russell, L.J.—The test of the statute is not prime source of power, but electrical propulsion. The engine whose motive power is petrol does not propel the vehicles but what propels the vehicle is the electric motor.

LAWRENCE *v.* GEORGE MATHEWS LTD., (1929) 1 K.B. 1.

Workmen's Compensation Act, 1925—*Commercial travelling agent—Fatal accident by a tree falling while homeward—Agent choosing his own vehicle and prescribing his own journeys—Injury if arose out of and in the course of employment.*

A commercial travelling agent of a company, while returning home from a journey during which he had secured some orders for the Company, was fatally struck on the road by a falling tree blown down by a severe gale. The agent had under his contract to defray his own travelling expenses and prescribe his journeys. The agent's widow brought this action for compensation under the Act and the question was if the accident arose out of and in the course of his employment.

Held, by Sankey and Russell, L. JJ., that the accident arose out of and in the course of the employment as the incidence of the agent's employment took him within the zone of special danger. The fact that the accident was abnormal and not

necessarily incident to the performance of his employment is immaterial; the immediate event, the fall of the tree, is sufficient and there need be no other connection between what happened and the nature of the agent's work.

Per Lord Hanworth, M.R., dissenting.—The accident did not arise out of the employment, as the agent was at the spot of his own choice and not at the direction of the company—the manner, method and time of transit being selected by him. Further it is not an incident which normally occurs but only if the forces of nature are exercised upon the tree and to such a mishap all persons in the locality are liable.

LAKE *v.* CRONIN. HUNT *v.* CRONIN, (1929) 1 K.B. 31.

Revenue—"Bookmaker"—Employee in charge of a Bookmaker's office with authority to accept bets up to a fixed amount if a Bookmaker—Finance Act, 1926, *Section* 18.

The appellant was a salaried employee of a Bookmaker. He had sole charge of the premises in the absence of his master and though he had no authority to open new accounts with any one in his master's absence, he could accept personal bets and bets over the telephone up to a *certain* amount fixed by his employer. He had no responsibility but merely answered the telephone and recorded messages.

Held, that the employee was a "Bookmaker" within the meaning of section 18, sub-section (1) of the Finance Act, 1926, as he is a person who, as servant or agent of another person, carried on, whether occasionally or regularly, the business of receiving or negotiating bets, or who holds himself out or permits himself to be held out as a person who receives or negotiates bets.

It is not necessary to be "a servant or agent of another person" within the meaning of the section that he should be clothed with such a complete authority as to be the duplicate original of the person, whose servant or agent he is.

THE KING *v.* COUNTY OF LONDON JUSTICES, ETC., (1929) 1 K.B. 81.

Rating—Valuation (Metropolis) Act, 1869—*Valuation under—Appeal to Quarter Sessions—Appeal lodged in time—Section* 42, *sub-section* (13) *re. time for hearing appeal if imperative.*

The Port of London Authority was assessed under the Valuation (Metropolis) Act, 1869, at a certain valuation. The Port Authority preferred in time an appeal against the valuation and assessment. But the Quarter Sessions could not dispose of the appeal before the 31st March, the date fixed by section 42, sub-section (13) of that Act for determination of appeals against valuations. The question was raised whether the decision of the appeal after the 31st March was invalid and without jurisdiction.

Held, that the fixing of the date was in a sense imperative; but if for reasons beyond the control of the parties—like glut of business in Court, accident or reasonable adjournments—the appeal is not disposed of, the Quarter Sessions have jurisdiction to hear it even after that date.

Lord Esher's decision in *Reg* v. *County of London Justices* [(1893) 2 Q.B. 476] approved.

ADAMS *v.* CAMFONI, (1929) 1 K.B. 95: 98 L.J.K.B. 40.

Licensing Act, 1921, *Section* 4—*Licensee's servant selling liquor during prohibited hours—Sale without licensee's knowledge and against his order—Liability for sale by the servant.*

The respondent (a licensee) was prosecuted for unlawfully selling whisky through his agent in the licensed premises during other than business hours. Though the agent was in the licensee's employ as a messenger boy, the sale was against the orders of the licensee and not done in the course of performing any duty delegated to him by the licensee.

Held, the licensee is not an insurer warranting that no unauthorised person on his premises will supply his goods to customers during other than the permitted hours.

Quaere.—If it will be different if the boy was honestly, though mistakenly, intending to serve his master's interests in supplying his master's customers on credit.

[Section 4 runs thus:—"No person shall, except during the permitted hours (*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor."]

THE KING *v.* JOB WHITEHEAD, (1929) 1 K.B. 99: 98 L.J. K.B. 67.

Criminal law—Charge of carnally knowing a girl between 13 *and* 16 *years—Girl's story to her mother several months after—If amounts to corroboration of girl's evidence—Arrest*

by police—Constable cautioning accused—Silence of accused before constable—If can infer corroboration.

The prisoner was charged with carnally knowing a girl between 13 and 16 years of age. In the course of his summing up, the Judge directed the jury that though the statement made by the girl to her mother several months after the occurrence was not admissible in evidence, yet what the girl said could be inferred from what the mother did (*viz.*, charging the accused with the offence) and treated as corroboration of the girl's evidence in the box. Further that the jury were entitled to infer from the silence of the prisoner when charged by the constable that the girl's story is true and corroborated.

Held that, both were misdirections. Any inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself and was merely the girl's story at secondhand. Further it was not made at the first opportunity but several months after. Also the non-denial of the charge by the prisoner after the warning by the constable that, whatever he said would be taken down in writing and used in evidence could not be corroboration.

JAWETT, *In re*, 98 L. J. Ch. 7: (1929) 1 Ch. 108.

Bankruptcy—Object of Public Examination—Incriminating question—Bankrupt, if can refuse to answer.

In an action against a retail tradesman for infringement of the Patent of a Company by sale of certain lamps, the Court restrained the infringement by the tradesman and ordered costs to be paid by him to the Company. For non-payment of the costs, the tradesman was adjudged a bankrupt. At the Public Examination, the Registrar asked him to disclose the source from which he got the lamps; but he refused to answer those questions on the ground that his answers might incriminate people who had trusted him. *Held*, that unless the bankrupt showed that the question was irrelevant, he may be compelled to disclose the information. The object of the Public Examination is to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of the creditors.

PARKES GARAGE (SWADLINCOTE) *In re,* 98 L. J. Ch. 9.

Company—Debenture in favour of some creditors—Insolvent circumstances—Floating charge created—Independent covenant to pay principal and interest—Payment of principal and interest—Subsequent winding up within three months—Payment if can be recalled—Companies (Consolidation) Act, 1908, Section 212.

To satisfy certain of the pressing creditors, a Company in embarrassed circumstances executed a debenture, whereby it covenanted to pay on demand to a trustee for the creditors, the principal and interest due on the debenture and further created a floating charge over all its property and assets for the payment thereof. The Company paid off the amount shortly after. But within three months of the debenture, proceedings were commenced for its winding up at the instance of another creditor. The liquidator filed this summons under section 212 of the Companies Act, 1908, to set aside the charge created by the debenture and to recover the amount paid by the Company to the trustee.

Held that, in the absence of proof that the Company immediately after the creation of the charge was solvent, the charge was invalid—the winding up having commenced within three months of the charge. But section 212 cannot affect the covenant for principal and interest contained in the debenture and the payment cannot therefore be recalled except in proper proceedings to set aside the transaction as a fraudulent preference.

HOULDER, *In re.* H. C. RABBIDGE (TRUSTEE) *v.* EAGLE STAR DOMINIONS INSURANCE CO., 98 L. J. Ch. 12.

Bankruptcy of surety—Payment by a co-surety between the date of receiving order and proof—If must be deducted.

One of the sureties who had guaranteed the whole of the principal debtor's debt became a bankrupt. Between the date of the receiving order and the date of the proof, a co-surety had made certain payments to the creditor towards the principal debt. The question arose if the creditor could prove for the whole debt due on the date of the receiving order without giving credit to the amounts collected from the co-surety.

Held, except in claims arising in connection with negotiable instruments, the creditor can (in the surety's bankruptcy), prove for the whole debt, without deducting the sums received

from a third party—not the principal debtor—provided that he does not receive in the whole more than 20 shillings in the pound, including the amounts he had got from such third person (the co-surety here).

EGYPTIAN DELTA LAND AND INVESTMENT CO., LTD. *v.* TODD, (1929) A.C. 1: 98 L.J.K.B. 1.

Income-tax—Company registered and incorporated in England—Business entirely carried on outside—Registered office alone in England—If Company resides in England.

A Company was incorporated in England under the Companies Acts in 1904. Except for a registered office and a formal secretary with no authority to do anything more than the law strictly required the Company to do, the whole of its business was since 1907 controlled, managed and carried on at Cairo, outside the United Kingdom. No business was at all transacted in England. The Company was assessed to income-tax in respect of interest arising from mortgages or rents arising from leases of land in Egypt on the ground that the Company was "a person resident in the United Kingdom".

Held (by the House of Lords), the question where a Company resides is mainly a question of fact. Registration is one of the facts to be taken into consideration in determining the residence of a Company but not necessarily the sole and exclusive fact. For income-tax purposes, the residence depends on other facts, *e.g.*, the mode and place from which it controls and directs its affairs.

Were the question independent of authority and there were not the new Rule 7 of the All Schedules Rules to the Income Tax Act, 1918, Lord Warrington of Clyffe would probably incline to the view that as a cumulative effect of the provisions in the Companies Act *re.* the effect and duties of registration, whatever other residence the Company may have, the Legislature has provided that the registered office shall be a residence.

Cesena Sulphur Co. v. *Nicholson,* 1 Ex. D. 428 and *De Beers Consolidated Mines* v. *Howe,* (1906) A.C. 455 followed.

Swedish Central Ry. Co. v. *Thomson,* (1925) A.C. 491 distinguished.

JOTTINGS AND CUTTINGS.

Street Offences.—The Report of the Committee which was appointed rather more than a year ago by the Home Secretary, with the Right Hon. Hugh Macmillan, K.C., as Chairman, has presented a carefully thought out and common-sense report, which, subject to a few reservations by individual members, is unanimous. The terms of reference to the Committee were "to enquire into the law and practice regarding offences against the criminal law in connection with prostitution and solicitation for immoral purposes in streets and public places and other offences against decency and good order, and to report what changes, if any, are in their opinion desirable". Naturally commencing by ascertaining the state of the law as it at present exists, the Report calls attention to the fact that the penal law with regard to prostitution and solicitation is founded on special legislation rather than on any principle of the common law. And the statute law on the subject is in a decidedly unsatisfactory state. The Metropolitan Police Act, 1839, affects the Metropolitan Police District; the Town Police Clauses Act, 1847, which is now incorporated in the Public Health Act of 1875, is applicable to all urban districts but not to the metropolis, though a number of the larger towns have local enactments dealing with this subject; whilst Scotland has a comparatively recent consolidating measure, the Burgh Police (Scotland) Act of 1892, which applies to almost all burghs except Edinburgh and Aberdeen, which have their own Acts. And there are, of course, numerous authorities throughout Great Britain which have power to make, and do make, bye-laws dealing with prostitution and solicitation within their own areas. The Committee recommend that the law on the subject, whatever it may be decided that the law ought to be, should be made uniform throughout the country, and that the multifarious general and local enactments which at present deal with solicitation between the sexes should be repealed and replaced by a specific enactment of general application.—*L.J.*, p. 400.

The Problem and the Remedy.—In considering what, if any, changes in the law should be made, the Committee were faced with a very delicate problem. Remembering always that immorality between the sexes is not an offence, and that no one suggests that it should be made such; bearing in mind on the one hand the importance of maintaining order and

decency in the streets and of ensuring that persons are not subjected to annoyance, and, on the other, the necessity of making sure that charges in respect of street offences should be satisfactorily proved; the framing of suggestions for the amendment of the law obviously presented great difficulties. At present it is necessary in England, but not in Scotland, to prove the fact of annoyance to the person solicited. As the Committee point out, it is only in the rarest cases that the person solicited is willing to give evidence, and the annoyance is usually proved by the evidence of a constable who states that the man accosted "appeared to be annoyed". It is recommended that the requirement of proving annoyance should be eliminated and that it should be made an offence to importune any person of the opposite sex for immoral purposes. It is suggested that the word "importune" shall be construed as referring to acts of molestation by offensive words or behaviour. It is proposed that loitering by prostitutes shall be dealt with by providing that a person who frequents any street or public place for the purpose of prostitution or solicitation so as to constitute a nuisance shall be guilty of an offence, but that the evidence of at least one person aggrieved shall be necessary for a conviction. If these suggestions are carried out, the result will be that the law will be the same for both sexes, and that in charges of importuning, a constable would no longer have to infer annoyance on the part of the person solicited, but would confine himself to what he saw and heard. This would be a real improvement. The Committee make a number of valuable observations with regard to evidence by the police and the employment of plain clothes and women police. We particularly welcome two of their suggestions—the first that gratuities from members of the public to the police for services rendered should be forbidden; and the second, that the requirements as to entering into recognizances when appealing from summary convictions should be altered. As we have repeatedly urged, and as the Committee point out, the present state of the law on this subject makes the right of appeal purely nominal in the case of poor persons.—*L.J.*, p. 400.

A Memorial to Lord Haldane.—It is stated in *The Times* that at a meeting held at the House of Lords on Wednesday, at which Lord Justice Sankey presided, it was resolved to raise a fund to commemorate Lord Haldane. As to the propriety of such a memorial there can be no question. Lord Haldane's

services as Lord Chancellor place him very high in the succession of eminent men who, as "Victorian Chancellors," or later, have occupied the Woolsack, and it is well known that with his legal ability and services there were combined contributions to practical administration and philosophic thought, which in either domain would have placed him in a high position. Such an association of talent and service is not likely to recur.—*L.J.*, p. 419.

The New Judge.—Although speculation as to who would be selected to succeed the late Mr. Justice Salter had been singularly small, the appointment of Sir Malcolm Macnaghten, K.C., occasioned no surprise. He had, indeed, been freely "tipped" on the occasions of each of the last few vacancies, and it had for some time been recognised that, if he desired judicial honours, his elevation to the Bench, in due course, was a practical certainty. If less familiar to the public than some of the "stars" of the King's Bench Division, Sir Malcolm has been well known to those practitioners who require a sound and painstaking leader for "heavy" cases; and he has enjoyed a substantial and growing practice before the Judicial Committee of the Privy Council. Sir Malcolm Macnaghten joins the select band of Judges whose fathers preceded them on the Bench; the others are Lord Justice Russell, Mr. Justice Romer, Mr. Justice Finlay and Mr. Justice Charles. Of Lord Macnaghten's fame it is unnecessary to say even a word; it will endure as long as cases continue to be cited in the Courts. Sir Malcolm's appointment is welcome on personal grounds, and it is an added source of satisfaction to the profession that the Bench again includes a bearer of the great name of Macnaghten.—*L.J.*, p. 419.

Portia's Lament.—Are the women having fair play? A correspondent, writing in the *Sunday Dispatch* of the 16th inst., suggests—or more than suggests—that they are not. He (or she) has taken "a census of the opinions of several young women now at the Bar. There is no doubt of their feelings in the matter." One of them roundly declares that "solicitors are the most pig-headed reactionaries in the world". Another could give "an enormous list of women as highly qualified as any male junior". And a spirit of revolt is rising. "We are not going to stand it." The correspondent concludes: "It is revealing no secret to state that several prominent women bar-

risters are now considering what steps they may take to ventilate their grievance."—*L.J.*, p. 420.

A Word in Season.—A certain acidity and snappiness, in interchange between Bench and Bar in Court, has at times been apparent during the old year. In County Courts on some occasions, and in the High Court more than ever, observers have noted it with uneasiness and acute discomfort; and it is to be hoped that these rare verbal displays will be voluntarily and altogether suppressed. They give to the enemy occasion to blaspheme; and they are profitable to none. Circumstances of general aggravation may exist; and if the temptation is greater than they can bear, it is for Judges and Counsel to pray that they be not led into temptation. For this little homily the season and the importance of the subject are my excuse.

Such incidents are not peculiar to the dead legal year. Rebukes were in the past from time to time administered to Counsel from the Bench, and Counsel on various occasions retorted in kind. The right of the Judge to rebuke Counsel is established—all depends on how it is done. "There is due," says Francis Bacon, Viscount St. Albans, "from the Judge to the advocate some commendation and gracing where causes are well handled and fair pleaded, especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel and beats down in him the conceit of his cause."—*L.J.*, p. 451.

Rebuking Counsel.—"There is likewise," said Francis Bacon, "due to the public a civil reprehension of advocates, where there appeareth cunning Counsel, gross neglect, slight information, indiscreet pressing, or an over-bold defence." He makes no reference to the converse situation—the reprehending of Judges by those appearing before them. But in the past there have been occasions when members of the Bar have entered firm protests against judicial comments or actions with the full support of the public and their fellow-practitioners.

It was Mr. Benjamin, Q.C., who made a silent rejoinder to the learned Law Lord who ridiculed his argument—he tied up his papers, bowed and retired. But Sir Richard Bethell (afterwards Lord Westbury) preferred to speak when he fell foul of Knight-Bruce, L.J. Sir Richard was appearing for

a solicitor in whose favour a solicitor had executed a deed of assignment for costs and money assigned to her. In the Court below the deed was set aside, and the solicitor appealed. "I am astonished," said Knight-Bruce, L.J., during the opening of the case, "that an experienced professional gentleman should have been so imprudent." "Your Lordship," said Bethell, "will hear the case first, and if your Lordship thinks it right you can express surprise afterwards." Nor did Mr. Charles Russell, Q.C., fail to speak his mind when he thought that James, L.J., was wanting in courtesy to the Bar.—*L.J.*, p. 451.

A Good Story.—A member of the Bar, not richly endowed with intellect, after years of brieflessness, married a rich wife. She died. Again he sought a bride with a rich dower ; and once more became a widower. Therefore he thought he would resume his long-neglected practice at the Bar. He approached an old friend, who had meanwhile become a Judge of the Supreme Court, and asked what, in his opinion, would be the wisest course for him to pursue. "If I were you," replied the Judge, "I should stick to the Probate and Matrimonial."—*L.J.*, p. 451.

From the Bar to the Pulpit—A Nephew of Mr. H. Labouchere, M. P.—On Saturday, December 29, the Bishop of Coventry will institute the Rev. Edward Labouchere Ruthven Thornton, curate of Brockenhurst (Hants), to the benefice of Walton d'Eivile, near Warwick. He is a nephew of the late Mr. Henry Labouchere, M.P., Editor of *Truth*, and elder brother of Mr. Maxwell Thornton, late Liberal M.P. for Tavistock. Qualifying for the Civil Service, and entering the Inner Temple, he went to India in 1891, serving in various capacities, the most important being Collector (Chief Administrative Head) of Madura District—a post he held when King George visited that country as Prince of Wales—and District and Sessions Judge of Trichinopoly. Shortly after he vacated the latter office his successor was assassinated by a disappointed litigant.

While on furlough in 1910 Mr. Thornton secured a First in the Bar Final, and was called to the Bar. In 1915 he joined the chambers of Sir Edward Marshall Hall. The war made it necessary for him to return to India, where he served in the Defence Force and became enrolled as an advocate of the Calcutta and Madras High Courts. On his return to England in

1925 he began practising before the Judicial Committee of the Privy Council, where he "led" early in 1926 in a sensational case, *Skipp* v. *Kelly,* from Bangalore.

Finally, after discussing the matter with his old schoolfellow, the Bishop of Winchester, he decided, in view of the shortage of men in the Church, to take holy orders, and was ordained deacon by his lordship in 1926, and priest the following year. Since his ordination he has been curate of Brockenhurst, and was for six months in sole charge of the parish during an interregnum that occurred between the resignation of the last and the institution of the present Vicar.—*L.J.*, p. 454.

Legal History in Palatable Form.—Professor Holdsworth's inextinguishable pipe must have drawn well when he delivered the lectures which make up the latest, lightest and most interesting of all his books—*Dickens as a Legal Historian* (Humphrey Milford: Oxford University Press). The Courts and the Dwellings of the Lawyers; the Lawyers, Lawyers' Clerks and other Satellites of the Law; *Bleak House* and the Procedure of the Court of Chancery; *Pickwick* and the Procedure of the Common Law; such are the first courses of this delightful feast.

The author shares the views—and cites them more than once—of Mr. Theobald Mathew as to the high value of Dickens as a legal historian. "The story of the suit for breach of promise of marriage brought by Mrs. Bardell, widow, against Samuel Pickwick, gentleman, is a mine of useful information to the antiquarian. Has not the time come for an annotated edition of that masterpiece, to which the student-at-law may be referred by readers and lecturers for a reliable account of the practical working of the law of personal actions when Queen Victoria ascended the throne?" Thus Mr. Mathew, and Professor Holdsworth thus: "I propose to show how, not only *Pickwick,* but many of the other novels of Charles Dickens, can be used to illustrate the legal history of his period." And he does.—*L.J.*, 1929, p. 14.

The Bear Garden.—A reference to the description of Judges' chambers in *Pickwick* is followed by the citation of the witnesses who gave evidence before the Common Law Procedure Commissioners in 1831; from which source it may very well be that the Bear Garden derives its name. Said Mr. Thomas Lott, an attorney: "The rule office on that first day

of term is a perfect bear garden; and when there has been a great pressure of business, and those dirty little holes, the Judges' chambers, much crowded, I have seen oaths administered through the window to deponents in the courtyard, and persons excepting to bail compelled to make their exit through a back window rather than encounter the crowd."

It was not long after *Bardell* v. *Pickwick*, according to Mr. Theobald Mathew, that Parliament was petitioned in vain to provide more seemly quarters; "and the squalor, the crowd, and the fight to get into the Judge's room were features of a barrister's daily work" till the opening of the Royal Courts of Justice in 1882.—*L.J.*, p. 14.

A Company's "Residence".—A Limited Company, like any other corporation, is a person, though only by a legal fiction; but there has always been difficulty in ascertaining the "residence" of this fictitious person for the purpose of income-tax. "It is easy," said Lord Loreburn, L.C., in the *De Beers Case* [(1906) A. C. 455, 458], "to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied......A company cannot eat and sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business." Accordingly, the test that a Company resides where it is registered was discarded in favour of the test—where is its real business carried on? And this, as Lord Loreburn further said, is a pure question of fact to be determined according to the course of business and trading. In that case it was held that the De Beers Consolidated Mines, Ltd., was resident here, since the real control in all the important business of the Company, except the mining operations, was exercised here; although the Company was registered in South Africa, and the head office was there and the general meetings were always held there.—*L.J.*, p. 22.

Residence both Here and Abroad.—A step further was taken in *The Swedish Central Railway Co.'s Case* [(1925) A.C. 495], where it was held that a Company could have more than one residence for the purpose of income-tax. The Swedish Railway Company was registered here, and its business was at first controlled from London, but subsequently it altered its articles so as to enable the control and management of the business to be transferred to Sweden. This was done, but the

Special Commissioners found that the Company was resident here, and the House of Lords refused to disturb this finding; only, however, because the Company could have two residences. "The central management and control of a Company," said Lord Cave. L.C., "may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence." In the recent case of *Egyptian Delta, etc., Co.* v. *Todd* [(1929) A.C. 1], the contention that a Company's residence depends on the place of its incorporation was revived, and it was argued for the Crown that incorporation under the Companies Act, with the attendant statutory obligations, made the Company resident here. The Company was incorporated here in 1904, but its business was in 1907 transferred to Cairo, and since then it had been controlled and carried on entirely in Cairo. Under these circumstances the Company was held by the House of Lords, reversing the Court of Appeal [(1928) 1 K.B. 152] to be resident in Egypt, and resident there only. It seems to have been assumed that in the *Swedish Central Railway Co.'s Case* some business was done in this country so as to justify the finding of a double residence. But this was not so in the present case, and the fact of incorporation here seems to have been regarded as of slight importance. The case is specially interesting for the illuminating judgment of Lord Sumner, and particularly for his remarks at page 32 on the drafting of amendments to the Income Tax Act, 1918.—*L.J.*, p. 23.

A Dickens Chancellor.—Lord Lyndhurst, the Lord Chancellor of *Bleak House,* in whose Court Charles Dickens functioned as a reporter, could, according to the book of legal anecdotes, make a joke and admit a fault.

When Brougham was once decrying the salary attached to a new Judgeship, observing that it was all moonshine, Lyndhurst observed: "It may be; but I fancy you would like to see the first quarter of it." On another occasion, growing weary of a slow-going counsel, he observed, in an audible undertone, "This fellow is a fool." Later, becoming aware of the merit of the argument, he spoke in a low voice, "Not so great a fool as I thought." At the end of that excellent address he was filled with admiration and remorse, and audibly muttered, "I was the fool." Such is the story told by Lord Romilly, who had it from a Registrar of Lord Lyndhurst's Court.

And the words used of the Lord Chancellor in *Bleak House* would fit him: "He dismissed us pleasantly, and we all went out, very much obliged to him for being so affable and polite; by which he had certainly lost no dignity, but seemed to us to have gained some."—*L.J.*, p. 33.

CONTEMPORARY LEGAL LITERATURE.

In an article in *The Law Quarterly Review* (July 1928) headed "Recent changes in Family Law," Mr. Edward Jenks examines the provisions of the Guardianship of Infants Act, 1925, the Summary Jurisdiction (Married Women) Act of the same year and the Legitimacy and the Adoption of Children Acts of the year 1926 to see how far they conform to the accepted tests of sound legal reform in a system like the English, which professing to be the expression of the good customs of the realm and not claiming to be an *ideal* code whether of divine or human origin, has to accord with enlightened public opinion and be workable in practice. He points out that English Family Law has been drastically overhauled by legislation and judicial interpretation within the last century and become almost unrecognisable. The obvious ideal, according to the author, which these changes have had before them has been absolute legal equality in the position of husband and wife. These Acts have removed the risk that that ideal runs of the parents making the children of the marriages mere powers in their perpetual struggle for equality and they accordingly enact that in considering any question regarding the custody or upbringing, or the administration of the infant, the infant's interests and not the rights of the parents, shall be the paramount consideration.

Mr. Jenks then proceeds to indicate certain fundamental objections to the Legitimacy Act of 1926, Summary Jurisdiction (Separation and Maintenance) Act of 1925, and Guardianship of Infant's Act of 1925. The main object of the Legitimacy Act is "to lay down the rule that a person born out of wedlock shall be made legitimate for all purposes (except the inheritance of political privileges and property settled to go therewith) by the subsequent marriage of his natural parents, subject to one exception, viz., that this rule will not apply to persons either of whose natural parents was married to a third person. This rule does not require the concurrence of the parents for legitimation. The non-provision of a penalty in the Act for

failure or refusal by the parents to re-register the child as legitimate, the author points out, will necessitate the person who claims to be legitimated to take steps to establish his legitimacy, which only means opening up an arena for family scandals and nullification of the advantages of legitimacy, *e.g.*, succession to property.

The Summary Jurisdiction Act provides that application for a separation and maintenance order may be made by a married woman, even though she has not in fact ceased to reside with the husband; and under the Guardianship Act, the mother of an infant may, while she is actually living with her husband, apply to the Court for the sole custody of her child and a weekly allowance for it. The learned author points out that whatever the intentions of the promoters of the Act may have been, the provisions are calculated more to turn a working-class household into a hell for the wife and children.

In the Adoption of Children Act, the author would add two more restrictions, *viz.*, (1) on the number of children who may be adopted, and (2) on the powers of parents of large natural families. At the same time he would like to completely identify the adopted child with its adopted family. The Act does give the child rights of intestate succession to the property of its adopted parent and the latter is not given rights of succession to the property of the adopted child should it die intestate, though it might have been acquired mainly through the generosity of his adopted parent.

The October number has a critical note on (1928) A. C. 181 doubting the interpretation put by the Judicial Committee on section 64 of the Hongkong Bills of Exchange Ordinance, 1885 (corresponding to section 64 of the English Bills of Exchange Act). The respondent accidentally mutilated a banknote, the material portions of it were however found and patched up but the number of the note was destroyed. Their Lordships held that "the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony" and the number was not material to the note.

The *Review* questions the decision in so far as it holds on an interpretation of the section that it "relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to a pure accident." The writer argues first

that under section 64 grammatically construed, a material alteration *however made* will avoid the bill unless it is one which has been assented to by the parties and that it is not necessary that it should be an alteration to which all parties *might* assent; and, secondly, that as an unauthorised alteration by a stranger avoids and discharges the bill (except as against a person who made or assented to it) there can be no difference in principle whether that stranger is a mouse or an unauthorised third party.

The note however agrees that the interpretation adopted by the Judicial Committee is a desirable one from the standpoint of justice and points out that the American Courts declined to follow the doctrine of the English Common Law as repugnant to justice.

[For a full discussion of the question, we would refer our readers to Taylor on Evidence, §§1820-21 and §§1827-29. Lord Buckmaster, who delivered the judgment under notice, thinks that *Davidson* v. *Cooper,* the leading English case on the question, does not cover the case of an accidental alteration, but only of a fraudulent alteration effected by the party or carelessness permitting it to be effected by another. In Leake on Contracts (7th Edition), p. 604, it is stated that "a contract is not affected by an alteration caused by mere accident" though "the party claiming under it must prove the accident and the original state of the instrument".

By sections 87-89 of the Negotiable Instruments Act the English Law on this subject has been adopted in this country.]

In a long article headed "Specific Performance and Doubtful Titles" published in the *Law Journal* (December 1 and 8, 1928), Mr. E. P. Hewitt, K.C., LL.D., examines in detail the history of the old rule that a title, the acquisition of which may involve a law suit, will not be forced upon a purchaser. That this view prevailed at least down to 1862 is clear from the fact that Mr. Sugden in the 8th Edition of his "Vendors and Purchasers" (pp. 385-386) published in 1862, says, "To enable equity to enforce specific performance against a purchaser, the title to the estate ought to be free even from suspicion, for it would be an extraordinary proceeding for a Court of Equity to compel a purchaser to take an estate which it cannot warrant to him." The tide changed by the time of *Alexander* v. *Mills* (6 Ch. 824) for there the Court of Appeal decreed specific performance though the Court below had

thought the title doubtful. The Court then felt that "it must determine, as it best may, what the law is, and to take that to be the law which it has so determined". But there was a set-back when Lord Selborne in *Palmer* v. *Locke* (18 Ch. D. 381) stated that *Alexander* v. *Mills* did not shake the law laid down by a long series of earlier decisions. Recently, the Court of Appeal in *Re: Nichols and Von Joet's Contract* [(1910) 1 Ch. 43] held the old rule to be still in force and Cozens Hardy, M.R., considered that (in cases involving construction) it ought now to be "more readily adopted". But in *Smith* v. *Colbourne* [(1914) 2 Ch. 533], the same learned Judge said, "Lastly, it was urged that the title is too doubtful to be forced upon a purchaser. The Courts have in modern times not listened with favour to such a defence"; in *Johnson* v. *Clarke* [(1928) Ch. 847: 97 L. J. Ch. 337], Maugham, J., has held that except when there is an easy mode by which the vendor could bring all persons interested in the estate before the Court, the Court is bound to decide any question of title between vendor and purchaser and to decide whether on the evidence which is produced at the hearing of the action for specific performance, the objection to title is good or bad.

The result of these various decisions, Mr. Hewitt says, would seem to be to leave the old rule, that a doubtful title will not be forced upon a purchaser, very much where it was. The rule still holds good; but its application depends in a large measure upon the character of the doubt and the degree in which it may be entertained. If the question on the title relates to some point of general law, the Court will generally act upon its own opinion of the law, unless there are conflicting decisions, or for other reasons the point is one raising grave doubts. But if the difficulty is one arising upon the "construction of a particular instrument," the Court is more disposed to refuse to force the title upon a purchaser; and this is so, whether or not the difficulty is one which can be readily disposed of by taking out an originating summons. In *Johnson* v. *Clarke* the difficulty arose upon the construction of "a particular instrument," drawn in very loose and ambiguous language—or, to use the words of James, L. J., in *Alexander* v. *Mills*, an "ill-expressed and inartificial instrument" The option for purchase which it purported to give to Mr. Richards was no doubt invalid; but it was extremely difficult to determine precisely what his rights under the instrument were. It is very material to bear in mind that the

learned Judge said that if there were "some easy method of ascertaining whether Mr. Richards has got the rights which he no doubt claims under the document, I am not at all sure that it would not be right for me to refuse the present order and to say that the vendor should clear his title; but I do not see that there is any easy method of determining that question." It is important also to notice that the objection did not relate to some possible claim which might at some future time be made; the claim had already been made, and the claimant was in actual possession. The prospect of litigation, therefore, was not remote, and the contention of the purchaser that the title should be cleared before he was compelled to complete the purchase seems to have been reasonable.

Messrs. Pollock and Mulla seem to think that this rule could not have arisen except in connection with the peculiar relations of Chancery to Common Law jurisdiction in England, and the anxiety of Chancery Judges to keep on good terms with the Common Law by being astute not to decide a purely legal question if they could help it. In India the case is covered by section 25 of the Specific Relief Act and the only question for consideration is whether the title is free from reasonable doubt. *See* 47 Bom. 369.

BOOK REVIEWS.

THE ADVOCACY SERIES, VOL. V—PREPARATION FOR TRIAL AND CONDUCT OF CASES, by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 4.

Here is a collection of all the essentials with which a lawyer should be equipped in order to make his career a complete success. It may not be always a golden principle in this profession, to be trying to imitate best examples, since it rarely happens, successes at the bar have been similar in their nature. Individual genius plays often a supreme part in shaping the course of each man's advance towards the summit. Yet it is better to place before the vast majority who are not above the average, many stimulating prescriptions for an efficient preparation and conduct of cases. The first few chapters of this book contain information for general guidance to those striving for a standard. It is a matter for gratification that some of the best rules for training oneself in the art of a trial lawyer have been enumerated from Judge Donovan's book. The concluding

pages are filled with too many nice cuttings from famous trials, just to be illustrative of the various qualities that have made lawyers of repute, still linger in our memory.

It is with pleasure we accept this volume.—K.C.

THE TRIAL OF EUGENE MARIE CHANTRELLE. Edited by A. Duncan Smith. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

This is again an interesting but strangely pathetic case of a murder of a wife by a husband. The prolonged agony of their married life with the unhappy end of Madame Elizabeth Chantrelle as its climax, is briefly told in the introduction to this volume. The Counsel for the defence, Mr. Trayner, spared no pains to show that death might have been the consequence of an accidental escape of coal gas from a broken pipe hard by. But the Lord Advocate Watson by his persuasive argument and with much medical and chemical evidence had convinced the Judge and the Jury that signs were not wanting to prove that it could not have been anything but a case of narcotic poisoning. Moreover the witnesses on the spot had deposed to the extreme probabilities of an administration of poison by Mr. Chantrelle to his wife. The presiding Judge, Lord Clerk Moncrief, had to rely on the whole evidence however circumstantial it may look.

This being one of the conspicuous trials in the annals of Scottish jurisprudence, we cannot pass without more than the usual word of praise at the high endeavours of the editor in bringing out its publication.—K.C.

THE LAW OF EVIDENCE IN INDIA, by M. C. Sarkar, 4th Ed., by S. C. Sarkar, published by M. C. Sarkar & Sons, Calcutta. Price Rs. 16.

This is the fourth edition of a well-known treatise. Sarkar's Law of Evidence in India has for some years been treated by the legal profession and the Bench as the leading treatise on the subject and has been consulted for enlightenment on all points arising under the Indian Evidence Act. It is therefore unnecessary to dilate upon its merits. It is sufficient to say that the present edition has incorporated the large number of decisions on the admissibility of the statements to the Police in the course of an investigation which have arisen under section 162 of the

Civil Procedure Code of 1898 as amended by Act XVIII of 1923. We need only add that the whole book has undergone a thorough revision and that all decisions up-to-date have been noticed and considered wherever necessary.

THE LAW OF SUCCESSION CERTIFICATE IN BRITISH INDIA, by Mohan Lal and Kapurchand. Expert Law House Series, Bhatnagar Book Agency, Fazilka. Price Rs. 2-8-0.

This is a commentary on the sections of the Indian Succession Act of 1925 dealing with succession certificates. These sections substantially re-enact the provisions of the Succession Certificate Act of 1889. They are the provisions which are largely resorted to outside the Presidency towns. A treatment of those sections with the decisions under them is therefore not uncalled for. The authors have with a view to enhance its usefulness incorporated not merely the decisions of the Chartered High Courts but of all the superior Courts in British India. The provincial amendments of the Court Fees Act and the several model forms and rules made by the superior Courts will be found useful in practice. It has to be noticed that the authors have not rested content with giving references to the decisions but have offered suggestions of their own wherever necessary which will provoke thought on the various points The author has also kept in view the needs of the University Students and the general reader in giving the outlines and the summary of the law on the subject.